

GB33GOMC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

15 CR 348 (PGG)

5 SANDY GOMEZ,

6 Defendant.

7 -----x
8 New York, N.Y.
9 November 3, 2016
2:30 p.m.

10 Before:

11 HON. PAUL G. GARDEPHE,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 RICHARD A. COOPER

SHAWN G. CROWLEY

PATRICK EGAN

18 Assistant United States Attorneys

19
20 LAW OFFICE OF NATALI J.H. TODD P.C.

Attorneys for Defendant

21 NATALI J.H. TODD
22
23
24
25

GB33GOMC

1 THE DEPUTY CLERK: United States of America v. Sandy
2 Gomez. Is the government ready?

3 MR. COOPER: Yes. Good afternoon, your Honor.
4 Richard Cooper, Shawn Crowley, and Patrick Egan for the
5 government.

6 THE COURT: Good afternoon.

7 THE DEPUTY CLERK: Defendant?

8 MS. TODD: Good afternoon, your Honor. Natali Todd
9 for Sandy Gomez. Mr. Gomez is also present.

10 THE COURT: I believe it's necessary to arraign
11 Mr. Gomez on a superseding indictment. Is that correct?

12 MS. TODD: Yes, your Honor.

13 THE COURT: Mr. Cooper?

14 MR. COOPER: Yes, your Honor.

15 THE COURT: Then Mr. Gomez, could you please stand.
16 You're here with Ms. Todd as your attorney this afternoon, is
17 that correct?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Have you received a copy of the S2
20 superseding indictment which reflects the charge against you?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have you had an opportunity to read the S2
23 superseding indictment?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Have you discussed it with Ms. Todd?

GB33GOMC

1 THE DEFENDANT: Yes, sir.

2 THE COURT: You should understand that you are charged
3 in the S2 superseding indictment with violating 21, United
4 States Code, Section 846, which makes it a crime to conspire to
5 distribute controlled substances, including cocaine.

6 Do you understand that's the charge against you?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you want me to read the S2 superseding
9 indictment to you now here in open court?

10 THE DEFENDANT: No.

11 THE COURT: I'll ask you now how do you plead as to
12 the charge in the S2 superseding indictment, guilty or not
13 guilty?

14 THE DEFENDANT: Not guilty.

15 THE COURT: Please be seated.

16 There are a number of pretrial motions that I'm going
17 to be addressing now. First, the defendant some time ago had
18 filed a motion for a severance as to his co-defendant Jorge
19 Gomez. That was Docket No. 73. Jorge Gomez has since entered
20 a guilty plea, however, so the severance motion is denied as
21 moot.

22 The government has moved in limine to admit first
23 testimony from a DEA agent concerning confidential source
24 information that led to the investigation that culminated in
25 the defendant's arrest. Citing Docket No. 84. The government

GB33GOMC

1 also seeks a ruling which would permit statements made by the
2 defendant to a cooperating witness to be introduced before the
3 jury. That's Docket No. 97. And finally, the government has
4 moved in limine with regard to the defendant's prior narcotics
5 conviction. It doesn't seek to introduce the conviction on its
6 direct case, but it says that the conviction may become
7 relevant for purposes of impeachment or as rebuttal evidence in
8 the event that the defendant argues or asserts that he's not
9 been involved in narcotics trafficking in the past, or lacks
10 knowledge of the drug trade. Citing Docket No. 97 at 4.

11 With respect to the evidence, background evidence
12 concerning the DEA's investigation, the government seeks to
13 offer testimony from a DEA agent concerning the conversation
14 the agent had with a confidential source in late November 2014.
15 In that conversation, the source told the agent that the
16 defendant's brother, Jorge Gomez, was interested in obtaining a
17 vehicle with a hidden compartment, which is commonly known as
18 a trap. Jorge Gomez had provided the source with a telephone
19 number that could be used to contact him. Citing Docket No. 84
20 at pages two to three. The DEA then arranged for a cooperating
21 witness to contact Jorge Gomez to offer such a vehicle. *Id.* at
22 page three.

23 The defendant objects to this testimony as hearsay and
24 as violative of the confrontation clause. Docket No. 108. It
25 is neither.

GB33GOMC

1 "Testimony containing hearsay may be admissible not
2 for its truth but as background information if (1) the
3 non-hearsay purpose by which the evidence is sought to be
4 justified is relevant, and (2) the probative value of this
5 evidence for its non-hearsay purpose is [not] outweighed by the
6 danger of unfair prejudice resulting from the impermissible
7 hearsay use of the declarant's statement." *Ryan v. Miller*, 303
8 F.3d 231, 252 (2d. Cir. 2002); quoting *United States v. Reyes*,
9 18 F.3d 65, 70 (2d. Cir. 1994). The same exception applies for
10 purposes of the confrontation clause. See *United States v.*
11 *Paulino*, 445 F.3d 211, 216 (2d. Cir. 2006) ("It has long been
12 the rule that so long as statements are not presented for the
13 truth of the matter asserted, but only to establish a context,
14 the defendant's Sixth Amendment rights are not transgressed."
15 Quoting *United States v. Barone*, 913 F.2d 46, 49 (2d. Cir.
16 1990)).

17 The proposed testimony concerning what the
18 confidential source said to the agent is not hearsay because
19 his testimony is not being offered for its truth. Instead, the
20 proposed testimony provides background and explains why the DEA
21 later arranged for a cooperating witness posing as someone who
22 rents vehicles containing secret compartments to contact Jorge
23 Gomez. Absent this explanation, the cooperating witness's call
24 to Jorge Gomez might be regarded by the jury as a random call.
25 The proposed evidence thus "offers an explanation for something

GB33GOMC

1 about which the jury would be curious." Citing *Ryan*, 303 F.3d
2 at 253. The risk of unfair prejudice to the defendant is
3 remote, because this information concerns Jorge Gomez, and not
4 the defendant. Moreover, Jorge Gomez's interest in obtaining a
5 vehicle with a secret compartment or trap will be demonstrated
6 both by testimony from the cooperating witness and by tape
7 recordings of conversations between the cooperating witness and
8 Jorge Gomez regarding the vehicle and its secret compartment.

9 Accordingly, the agent will be permitted to testify
10 that a confidential source told the agent that Jorge Gomez was
11 interested in acquiring a vehicle with a secret compartment,
12 and provided a telephone number where Jorge Gomez could be
13 reached. When this testimony is offered, the Court will
14 instruct the jury that the confidential source's statement is
15 not being offered for its truth, but rather only to explain the
16 agent's subsequent actions.

17 The government has moved in limine to admit evidence
18 on its direct case of certain statements that the defendant
19 made to a cooperating witness concerning the witness's
20 cooperation with the government and testimony at trial. Citing
21 the October 19, 2016 letter from the government, Docket No. 97
22 at page one. The government proffers "that the cooperating
23 witness will testify that following a status conference, before
24 [the Court], the defendant warned the cooperating witness
25 against cooperating with the government stating [that]

GB33GOMC

1 'snitches get their tongues cut out.'" *Id.* The government
2 also seeks to introduce evidence that the defendant told the
3 cooperating witness "that he and the CW could reach an
4 agreement and blame the whole thing on Jorge," presumably
5 referring to the defendant's brother and co-defendant Jorge
6 Gomez. *Id.*

7 The government argues that "evidence of the
8 defendant's efforts to obstruct the cooperating witness
9 testimony is clearly admissible as demonstrating his conscience
10 of guilt. " citing Docket No. 97 page two. The defendant
11 opposes the government's motion, arguing that the statements do
12 not demonstrate either conscience of guilt or witness
13 tampering, and that the evidenced is more prejudicial than
14 probative under Federal Rule of Evidence 403. Citing the
15 October 22, 2016 defense letter, Docket No. 102 at page one.

16 "Evidence of a party's consciousness of guilt may be
17 relevant if reasonable inferences can be drawn from it and if
18 the evidence is probative of guilt." Citing *United States v.*
19 *Perez*, 387 F.3d 201, 209 (2d. Cir. 2004). "Such evidence is
20 admissible if the Court (1) determines that the evidence is
21 offered for a purpose other than to prove the defendant's bad
22 character or criminal propensity, (2) decides that the evidence
23 is relevant and satisfies Rule 403, and (3) provides an
24 appropriate instruction to the jury as to the limited purposes
25 for which the evidence is introduced, if a limiting instruction

GB33GOMC

1 is requested. *Id.* Citing *United States v. Mickens*, 926 F.2d
2 1323, 1328-29 (2d Cir. 1991).

3 A Court may "admit evidence of attempted witness
4 tampering as probative of a defendant's conscience of guilt."
5 *Id.* The Second Circuit has instructed, however, that courts
6 considering the admissibility of evidence that a defendant
7 threatened a witness with violence must proceed with caution,
8 particularly where the "alleged threats [bear] no relation to
9 the offenses for which [the defendant] is being tried." Citing
10 *United States v. Morgan*, 786 F.3d 227, 232 (2d. Cir. 2015). In
11 *Morgan*, the Circuit stated that "the potential for unfair
12 prejudice is so great that Rule 403's balancing test permits
13 admission of death threat evidence only if there is a clear
14 need for the evidence and it serves an important purpose."
15 Citing *Morgan*, 786 F.3d at 229.

16 In *Morgan*, the government introduced evidence that the
17 defendant, who was on trial for firearms and narcotics
18 violations, had written letters to his girlfriend "seeking her
19 assistance in the murder of the government's informant." *Id.*
20 The Second Circuit vacated Morgan's conviction and remanded for
21 a new trial finding that "the death threat testimony, unrelated
22 as it was to the charged crimes, should have been kept from the
23 jury because its potential for causing unfair prejudice
24 outweighed its probative value with respect to Morgan's guilt."
25 *Id.* at 233, quoting *United States v. Panebianco*, 543 F.2d 447,

GB33GOMC

1 455 (2d. Cir. 1976). The Second Circuit further found that the
2 death threat evidence admitted during Williams's direct
3 examination had substantial "capacity to lure the jury into
4 declaring guilt on a ground different from proof specific to
5 the offense charged." *Id.* at 232, quoting *United States v.*
6 *Massino*, 546 F.3d 123, 132 (2d. Cir. 2008).

7 Here, the threat that the government seeks to
8 introduce that "snitches get their tongues cut out" is of
9 limited probative value and poses a significant risk of unfair
10 prejudice. As an initial matter, the defendant allegedly made
11 this statement to the cooperating witness after a status
12 conference in this case. Accordingly, the alleged "threat" [is
13 not] "inextricably intertwined with the evidence regarding to
14 the charged offense." *Id.* quoting *United States v. Quinones*,
15 511 F.3d 289, 309 (2d. Cir. 2007).

16 Moreover, the threat does not necessarily demonstrate
17 consciousness of guilt. Broadly defined, a snitch is someone
18 who cooperates with the government by testifying that someone
19 else did something unlawful. A person who is referred to as a
20 snitch is not necessarily telling the truth. Indeed, every day
21 in this courthouse, and in many other courthouses, defense
22 lawyers contend that such witnesses are lying, and juries
23 sometimes find that such witnesses have lied. In short,
24 assuming *arguendo* that the defendant made this threat to the
25 cooperating witness, he could be making this threat either

GB33GOMC

1 because he fears that the witness will falsely accuse him, or,
2 because he fears that the witness will truthfully inculcate
3 him. The statement is thus ambiguous, and has limited
4 probative value.

5 The risk of unfair prejudice to the defendant is
6 significant, however. The defendant is charged in a single
7 count with conspiring to distribute cocaine. And in the words
8 of the Second Circuit "the alleged threat here [bears] no
9 relation to the offense for which [the defendant] is being
10 tried." *Id.* Introducing an element of violence into this case
11 also has the potential to dramatically reshape it. While the
12 government seeks to distinguish *Morgan* by arguing that it "does
13 not intend to offer prolonged testimony or extensive evidence
14 concerning the defendant's attempt to obstruct the cooperating
15 witness's cooperation," see October 19, 2016, government letter
16 Docket No. 97 at three, it is difficult to predict what use may
17 be made of the threat once it is introduced. The government's
18 use of such evidence in summation in *Morgan* was noted by the
19 Circuit, and such use in summation is foreseeable here. Not
20 because the threat is particularly probative, but because it is
21 sensational.

22 For purposes of the government's direct case, I
23 conclude that introduction of the threat is not appropriate
24 under Rule 403 because the risk of unfair prejudice outweighs
25 the limited probative value of the threat.

GB33GOMC

1 By contrast, the defendant's alleged statement to the
2 cooperating witness "that he and the cooperating witness could
3 'reach an agreement' and 'blame the whole thing on Jorge'" is
4 highly probative and is in no way unfairly prejudicial. A
5 reasonable jury could infer that the defendant was suggesting
6 that he and the cooperating witness could "reach an agreement"
7 and falsely assert that only Jorge Gomez knew about the
8 cocaine. By suggesting that he and the cooperating witness
9 could by agreement shift the blame to Jorge Gomez, the
10 defendant implicitly acknowledged his own culpability. Such
11 witness tampering has been held to constitute conscience of
12 guilt. See *Perez*, 387 F.3d at 209 (noting that the Second
13 Circuit has "upheld the admission of evidence of attempted
14 witness or jury tampering as probative of a defendant's
15 consciousness of guilt") citing *Mickens*, 926 F.2d at 1329;
16 *United States v. Ivanova*, 19 F.Supp. 3d 511, 516 (S.D.N.Y.
17 2014) (admitting evidence that defendant "tampered with
18 witnesses as relevant toward her consciousness of guilt.")
19 Moreover, unlike evidence of the alleged threat of violence,
20 there is little risk that the evidence of the defendant's
21 proposal to "blame Jorge" will "unduly inflame the passion of
22 the jury, confuse the issues before the jury, or
23 inappropriately lead the jury to convict on the basis of
24 conduct not at issue in the trial." Citing *United States v.*
25 *Quattrone*, 441 F.3d 153, 186 (2d. Cir. 2006).

GB33GOMC

1 Defense counsel has asked that she receive proffer
2 notes concerning the cooperating witness before the Court rules
3 on the issue so that she can understand the context in which
4 these statements were made.

5 Mr. Cooper, has the 3500 material been turned over to
6 the defense?

7 MR. COOPER: Yes, your Honor.

8 THE COURT: So Ms. Todd, you have that information?

9 MS. TODD: Yes, I do, your Honor.

10 THE COURT: Has that given you a sense of the context
11 in which the statements were made?

12 MS. TODD: It does, your Honor.

13 THE COURT: All right.

14 The government's motion in limine is granted as to the
15 defendant's alleged proposal to reach an agreement to "blame
16 Jorge." If the defense wishes me to issue a limiting
17 instruction regarding this evidence, counsel will submit
18 proposed language to me by Monday morning.

19 Finally, as I noted, defendant has a 1998 conviction
20 for criminal possession of a controlled substance in the third
21 degree. The conviction stems from a March 20, 1998, incident
22 in which NYPD officers found him in a livery cab with
23 5 kilograms of cocaine. Citing the October 19, 2016,
24 government letter, Docket No. 97 at pages three to four. The
25 government does not seek to introduce evidence of this

GB33GOMC

1 conviction on its direct case, but argues that it may become
2 admissible for cross-examination or rebuttal "in the event the
3 defendant argues in his opening statement, through
4 cross-examination of government witnesses, or his own testimony
5 or the presentation of testimony from other witnesses, that he
6 has not been involved in narcotics trafficking or lacks
7 knowledge of the drug trade." *Id.* at page four. The defendant
8 has not opposed the government's motion.

9 Given that this motion turns on whether certain
10 arguments are raised by the defendant at trial, I will reserve
11 decision. *See United States v. Paredes*, 176 F. Supp. 2d 179 at
12 181 (S.D.N.Y. 2001). Noting that "courts considering a motion
13 in limine may reserve judgment until trial so that the motion's
14 placed in the appropriate factual context." I do note that
15 "should the defendant testify at trial, and suggest through his
16 testimony that he has never been involved in drug activity,
17 evidence of the conviction would directly contradict such
18 testimony, and the government may renew its motion to admit the
19 conviction." *United States v. Vasquez*, 840 F.Supp. 2d 564,
20 573-74 (E.D.N.Y. 2011).

21 While *Vasquez* speaks of the defendant's testimony, in
22 my judgment, the admissibility of the conviction might also be
23 appropriate, depending on arguments that are made by defense
24 counsel as well as the introduction of testimony through
25 witnesses other than the defendant. In any event, I reserve

GB33GOMC

1 decision on that matter.

2 We are scheduled to begin trial on Monday at 9:30. I
3 will meet with you then to discuss any issues that might have
4 emerged over the weekend. My anticipation is that a jury panel
5 will arrive some time between 10 and 10:15.

6 I will qualify how many jurors, Mike? 45. I will
7 qualify 45 jurors. I will hear challenges for cause once that
8 processes is complete. And then I will excuse the panel for 10
9 or 15 minutes and give the lawyers an opportunity to consider
10 the exercise of peremptory challenges.

11 MS. TODD: I'm sorry, your Honor. Your voice is
12 dropping.

13 THE COURT: Sorry. I said that I will excuse the
14 panel for 10 to 15 minutes in order to give the lawyers time to
15 think about the exercise of peremptory challenges. I will then
16 ask counsel to submit simultaneously lists of the jurors
17 against whom they wish to exercise peremptory challenges. The
18 defendant of course will have 10 peremptory challenges, and the
19 government will have six. And those lists will be submitted
20 simultaneously. I will then read the lists to you, and we will
21 agree on who are the 12 lowest numbered panel members that
22 remain, and they will become the jury. And then we will go on
23 to select the two alternates, and each side will have one
24 peremptory challenge as to the alternates.

25 With respect to the schedule, on Monday we'll sit 9:30

GB33GOMC

1 to 5. On Tuesday, Tuesday being Election Day, it is a court
2 holiday but I will not be observing the holiday except that the
3 schedule will be modified. I intend to sit from 9:30 to
4 2 o'clock on Tuesday without a lunch break, so we'll break for
5 a brief period some time around 11 or 11:15, depending on the
6 proof, and then we'll have another short break perhaps around
7 12:45 or so, and then we'll end at 2 o'clock so that people
8 have ample opportunity to exercise their voting rights.

9 The schedule for Wednesday and Thursday will be 9:30
10 to 5. And if necessary, my intention is to sit on Friday,
11 which is Veterans Day, even though that's a federal holiday.

12 I would ask the lawyers now that we are a little bit
13 closer to trial if they have a better sense of how long a trial
14 might take. So Mr. Cooper, what is your best estimate?

15 MR. COOPER: Your Honor, we think that our direct
16 case, given the schedule, will likely last until Wednesday,
17 perhaps to the very beginning of Thursday but not much longer
18 than that. Most likely to conclude on Wednesday.

19 THE COURT: All righty. Do you think we'll be able to
20 conclude on Thursday, Ms. Todd? Does that seem reasonable?

21 MS. TODD: That's a fair assessment, your Honor.

22 THE COURT: So I guess I'll tell the jury I expect the
23 trial will take about four days or so. Could be a little more,
24 could be a little less, but four days is our best estimate.
25 Other issues that the parties would like to raise?

GB33GOMC

1 MR. COOPER: Your Honor, we have a couple of
2 substantive and a couple of procedural issues to raise with the
3 Court. I guess I can knock off the procedural issues first.
4 Among the government exhibits are going to be transcripts or
5 translations of consensual recordings. The government's intent
6 is for some folks at the front table to read those, one person
7 taking one part, another person taking the other part.

8 THE COURT: Is someone going to sit in the witness
9 stand?

10 MR. COOPER: We intend to introduce them during the
11 course of the testimony of the confidential source who made the
12 recordings. So I think we would do it from the lecturn and
13 counsel table to read the portions of the transcript.

14 THE COURT: Any objection to that procedure, Ms. Todd?

15 MS. TODD: No, your Honor. We've discussed that.

16 THE COURT: Okay.

17 MR. COOPER: Second, your Honor, we're making
18 transcript binders for the jury. We obviously want to
19 distribute those in the least disruptive fashion. We can do it
20 prior to the time when that the witness during whose testimony
21 those transcripts will come in, before he takes the stand, or
22 we could do it at the point that we admit the transcripts.
23 We're not sure what the Court's preference is there.

24 THE COURT: I don't feel strongly about it. Mike,
25 what's your view? Should we just pass them out when they're

GB33GOMC

1 admitted?

2 THE DEPUTY CLERK: Yes.

3 THE COURT: We'll just pass them out. Mike will
4 distribute them to the jury once they're admitted.

5 MR. COOPER: All right. One substantive issue to
6 raise. Co-defendant Jorge Gomez pled guilty. The Court has --

7 THE COURT: Before we leave the subject of
8 transcripts, are the conversations in Spanish and they're
9 translated?

10 MR. COOPER: That's correct, your Honor.

11 THE COURT: So the transcripts will actually be the
12 evidence. And so Ms. Todd, have you reviewed the -- are you
13 going to have any objection to the transcripts being received
14 in evidence?

15 MS. TODD: No, your Honor. We've been working
16 together with the translators and making sure it's correct in
17 our view.

18 THE COURT: We may have some Spanish speaking people
19 on the jury, and it is my practice to tell them that even
20 though they may understand Spanish, they are obligated to rely
21 on the translation that the parties have put before them. So I
22 will give that instruction at the appropriate time.

23 Go ahead, Mr. Cooper. I interrupted you.

24 MR. COOPER: Yes, your Honor. Co-defendant Jorge
25 Gomez has pled guilty. The Court has accepted the plea. One

GB33GOMC

1 of the witnesses who is going to testify is Caronlay Ramon-Baez
2 who is another co-defendant.

3 To the extent that the cross-examination of
4 Ms. Ramon-Baez suggests that she is shifting blame from Jorge
5 Gomez to Sandy Gomez, or is shading her testimony in that
6 fashion, we believe we should be able to admit the fact of
7 Jorge Gomez's plea to counteract the misleading impression
8 which would be implicit in that sort of questioning or that
9 sort of argument that Jorge Gomez got off easy and that
10 Ms. Ramon-Baez was minimizing Jorge Gomez's role or was somehow
11 untruthful either with the government in proffer sessions or in
12 her testimony on the stand.

13 THE COURT: Now, was there a romantic relationship
14 between those two people, Jorge Gomez and the cooperating
15 witness?

16 MR. COOPER: Yes. They were romantically involved for
17 a period of time, although I believe the romantic part of their
18 relationship ended before the conspiracy period in this case.
19 But they had been romantically involved prior to that.

20 THE COURT: Ms. Todd, anything you want to tell us at
21 this point about your intentions?

22 MS. TODD: Yes, your Honor. And I would object
23 strenuously to what the government is proposing. Not only is
24 Ms. Baez's credibility and motive is at the center of all of
25 this, I think that is a fair -- that material is fair for

GB33GOMC

1 cross-examination. And Jorge Gomez pleading to whatever he
2 pled guilty to should not come in under any circumstances,
3 because he's not here on trial. And the fact that he's pled
4 guilty is prejudicial to my client who is charged in a
5 conspiracy with him, suggesting that he, too, is guilty.

6 Judge, I don't see under what rule of law that the
7 government would be allowed to allow Jorge Gomez's plea to come
8 in given the relationship, the longstanding relationship with
9 Ms. Baez and Jorge, and their relationship as being involved in
10 the drug conspiracy for what I understand to be quite some
11 time.

12 THE COURT: Mr. Cooper, what is your understanding,
13 separate and apart, actually, from this issue, what is your
14 understanding as to the admissibility of Jorge Gomez's plea
15 just for purposes of establishing the conspiracy?

16 MR. COOPER: I believe that under current Second
17 Circuit law, that would be impermissible in the government's
18 case in chief.

19 THE COURT: All right.

20 MR. COOPER: The idea here, your Honor, is if the
21 defense argument is that Ms. Ramon-Baez is misleadingly or
22 untruthfully shifting blame from Jorge Gomez to Sandy Gomez
23 through her testimony on the stand, implicit in that is that
24 she is protecting Jorge Gomez, that he is getting off easy in
25 some way. When the fact is that he pled guilty to a (b)(1)(A)

GB33GOMC

1 narcotics conspiracy offense.

2 We wouldn't seek to introduce anything other than the
3 fact that he pled guilty, and the charge that he pled guilty
4 to. Perhaps the date of the guilty plea as well. Which would
5 go to that very issue of whether Jorge Gomez somehow got off
6 easy, and that goes to whether the witness had a motivation to
7 lie.

8 THE COURT: So Ms. Todd, let me make sure I understand
9 your argument. You want to suggest that Baez is biased and
10 that she has decided to put the blame on Sandy Gomez in an
11 effort to protect her former boyfriend Jorge?

12 You want to do that, right?

13 MS. TODD: Not -- not entirely, Judge. That's -- I
14 think it's narrowing the scope of my cross-examination of her.
15 Jorge Gomez pled guilty because he is in fact guilty, whether
16 or not Ms. Baez had anything to do with it one way or the
17 other. They had a relationship, for a long time she protected
18 him.

19 I've received information in the 3500 material that
20 the government has provided me that indicated that at some
21 point, that discussion was raised between Ramon-Baez and Jorge
22 Gomez, whether or not they should actually come together and
23 blame Sandy. And I don't know what ultimately she decided to
24 do. But that's ripe for cross-examination, and I should be
25 allowed to do that. It goes exactly to her bias, and her

GB33GOMC

1 motive.

2 THE COURT: Yes. But the problem that we're currently
3 discussing is, assuming that you go down the road that you just
4 described, the takeaway on the jury's part could be that Baez
5 has, as a result of shifting blame on to Sandy, allowed Jorge
6 to get away scot-free. And that would be a misleading
7 impression. That would be wrong.

8 MS. TODD: It --

9 THE COURT: In other words, it wouldn't be fair to the
10 government for the jury to come away with the impression that
11 as a result of Baez incriminating Sandy Gomez, that Jorge Gomez
12 got away scot-free.

13 MS. TODD: I don't think I would suggest that in my
14 cross-examination in any way, because not only would that just
15 be entirely misleading to the Court and to everyone, that's not
16 my intention at all.

17 THE COURT: Okay.

18 MS. TODD: But to not allow cross-examination with
19 respect to her relationship and favoritism with respect to
20 Jorge Gomez I think is limiting my client's right to confront
21 his witnesses.

22 THE COURT: I guess the devil's in the details. I
23 accept your point that Baez's former relationship with Jorge
24 Gomez is appropriate fodder for cross-examination. But I am
25 concerned about any questioning which would suggest to the jury

GB33GOMC

1 something that is counterfactual. And I think that's what the
2 government is concerned about, too. They're concerned that the
3 takeaway from your cross-examination might be that she is
4 motivated to incriminate Sandy Gomez in order to protect her
5 former boyfriend. And if that was the impression that you were
6 trying to create --

7 MS. TODD: No, Judge.

8 THE COURT: I know you're not doing that. You've said
9 that now a couple of times. But I'm trying to figure out what
10 exactly you are going to say. Because it goes directly -- let
11 me sort of just get down to the basics here.

12 If you were going to go down that road, whether Jorge
13 Gomez pled guilty goes directly to her motivations to
14 incriminate Sandy Gomez. Because once Jorge Gomez has pled
15 guilty, then her motive for protecting him largely goes away.
16 Maybe it goes away entirely. And so that's kind of the nub of
17 the issue.

18 We can't have a situation where the jury thinks Baez
19 has a motive to protect Jorge Gomez from prosecution, when the
20 truth is, he's already pleaded guilty. So that's the problem.
21 That's the nub of the problem.

22 And I understand you don't want Jorge Gomez's plea to
23 come in. But, we also can't have a situation where the jury
24 could come away with the impression that Baez has a motive to
25 implicate or incriminate Sandy Gomez, because Jorge is subject

GB33GOMC

1 to prosecution and is in jeopardy of prosecution, when in fact
2 the truth is he's already pleaded guilty.

3 MS. TODD: That's fine, Judge. But what I'd like to
4 be able to do, which I think I'm entitled to, is to speak to
5 the history of these two, what she has done in the past. With
6 respect to her protecting Jorge Gomez, I've got enough, I think
7 I've got enough fodder to work with without having to make that
8 claim that that's what she's doing.

9 So I have no intention to say she's protecting Jorge
10 while throwing, for lack of a better word, Sandy Gomez under
11 the bus in this situation. But I will speak to the history of
12 the two of them, and what she's done in the past, which I think
13 is highly relevant.

14 THE COURT: When you say what she's done in the past,
15 are you comfortable enlightening me?

16 MS. TODD: In terms of their relationship --
17 historical drug relationship, and what she's done to protect
18 him in the past and protect the business that they were in
19 together. I think that's fair.

20 THE COURT: Mr. Cooper, your thoughts?

21 MR. COOPER: Your Honor, it seems like a couple of
22 different issues there. The clearest example is the one that
23 the Court posed where there is the argument, implicit or
24 explicit, that the testimony on the stand is shaded in any way
25 to allow Jorge Gomez to get away scot-free or with little

GB33GOMC

1 consequences. It seems that issue is fairly clearcut.

2 We're in no way seeking to preclude or seeking a
3 ruling precluding cross-examination of Ramon-Baez on any of
4 these issues. We believe it's all fair game for
5 cross-examination. It's difficult to predict how some of these
6 questions would play, or how the answers would come out either.

7 But to the extent there is an argument implicit in the
8 questions that even as a result of their prior drug dealing
9 relationship or their prior romantic relationship, that
10 Ms. Ramon-Baez would have any motive to shade the truth about
11 Jorge Gomez vis-a-vis Sandy Gomez on the stand, the plea does
12 seem relevant.

13 If the argument is they were romantically involved in
14 the past, and anyone who has a romantic partner would of course
15 not say anything bad about that romantic partner, maybe that's
16 a different story. It is hard to see how that argument gets
17 made on these facts.

18 THE COURT: I'm sorry. Could you say that to me
19 again?

20 MR. COOPER: Sure. If the argument is purely a
21 historical one, in that these two were lovers in the past, and
22 nobody would want to do anything to implicate one of their
23 previous lovers, that seems purely historical. It's rebutted
24 by the facts.

25 THE COURT: Could I just step back for a second.

GB33GOMC

1 Because of course I have no idea what she's going to say. But,
2 I assume she's going to implicate Jorge Gomez. Am I wrong?

3 MR. COOPER: Absolutely.

4 THE COURT: So I guess, Ms. Todd, it's not really
5 clear to me how she could be -- and maybe, Mr. Cooper, this
6 should be better directed to you. Assuming Baez gets up and
7 tells the whole story about how Jorge wanted this vehicle to go
8 down there and pick up drugs and bring it back and got Sandy
9 involved and all of that, all of that is highly incriminating.
10 And so, how could the jury come away with a sense that while
11 she's protecting Jorge, what she's going to say will be highly
12 incriminating of him, right?

13 MR. COOPER: Sure. One of the concerns here is that
14 there is in the 3500 for Ramon-Baez discussions with both Sandy
15 Gomez about, hey, we should get together and put the blame on
16 Jorge. There are also discussions with Jorge Gomez going in
17 the opposite direction. This is while Jorge was still a
18 defendant here. Hey, let's get together, we're going to put it
19 all on Sandy.

20 THE COURT: But she's not going to do that on your
21 direct case. You're going to elicit the full story about Jorge
22 and she's going to incriminate him quite substantially, I
23 suspect. And so, in the unlikely event that Ms. Todd was going
24 to be arguing to the jury that she's trying to protect him, it
25 doesn't seem that that argument would have very much traction,

GB33GOMC

1 given she's going to get up here and completely incriminate
2 him.

3 MR. COOPER: That's true, your Honor. She is going to
4 get up there and talk about Jorge Gomez's role in the whole
5 thing.

6 THE COURT: So it would seem to be a ridiculous
7 argument to get up and say, oh, you shouldn't believe Baez
8 because she's protecting Jorge, when she just got through
9 giving all this testimony that's highly incriminating of Jorge.

10 MR. COOPER: We agree it is unlikely. We wanted to
11 raise it with the Court and with defense counsel, just so
12 everybody was aware that that's our intention, if the argument
13 goes in that direction. Which, admittedly, isn't the likeliest
14 place for it to go, but you never know.

15 THE COURT: I'm glad you did. I'm glad you did. And
16 I think I've made it crystal clear I'm not going to countenance
17 anything that could mislead the jury about the fact that Jorge
18 Gomez actually pled guilty. Any suggestion to the contrary,
19 that he's going to escape liability or jeopardy, I would view
20 quite dimly.

21 But, given the context here, while I think we have to
22 tread carefully, Ms. Todd, and I think you have to tread
23 carefully, it doesn't seem to me that the argument that
24 Mr. Cooper is concerned about is one that you're likely to
25 make. But you have to tread very carefully because I'm not

GB33GOMC

1 going to allow the jury to be misled.

2 MS. TODD: That was my confusion, your Honor. Because
3 I expect her to get up there and talk about what she's to done
4 with Jorge and implicate my client and implicate Jorge in the
5 process. So I was somewhat trying to narrow the scope because
6 I didn't understand how that would make a difference. But I
7 think we'll be fine, Judge.

8 THE COURT: Okay.

9 MR. COOPER: There is one other issue, your Honor,
10 that be Ms. Crowley can speak to.

11 THE COURT: Yes.

12 MS. CROWLEY: Just with respect to your Honor's ruling
13 on the government's motion to elicit testimony of the
14 defendant's threat to the cooperating witness. We understand
15 your Honor's ruling. We do just want to raise for the Court at
16 this point that we expect that the cooperating witness,
17 Ms. Ramon-Baez, will testify that she began meeting with the
18 government last summer, 2015, and that the government
19 instructed her not to continue communicating with either of the
20 co-defendants. And that despite that instruction, in the year
21 between her first meeting and the next meetings with the
22 government, Ms. Ramon-Baez continued to communicate with both
23 defendants. Her communications have been provided to defense,
24 of course, in 3500 material.

25 We expect that Ms. Ramon-Baez is going to testify that

GB33GOMC

1 the reason she continued to communicate with both defendants,
2 including Sandy Gomez, is because she was afraid of them. And
3 she thought that if she stopped talking to these people who she
4 had been talking to so frequently, and who she was arrested
5 with, they would figure out that she was cooperating with the
6 government.

7 Part of that testimony would have been that Sandy
8 Gomez threatened her by saying snitches get their throats cut
9 out.

10 So, we're not seeking to revisit your Honor's ruling
11 at this point, but to the extent there is cross-examination of
12 Ms. Ramon-Baez on that point of her continued communication
13 with this defendant, then we may seek to revisit your Honor's
14 ruling at that point.

15 THE COURT: Let me ask you this. Would you be
16 comfortable merely eliciting from her that she didn't want
17 either man to find out that she was cooperating and leave it at
18 that, without getting into this whole thing about her being
19 afraid of them? Because it would be normal for a cooperator
20 not to -- it's completely normal for every cooperator to not
21 want their cooperation to become known to their co-defendants.
22 And there is nothing unusual about that.

23 Ms. Todd, how do you propose to address the problem?
24 Because I think it sounds like it's going to come up, because
25 she continued to have conversations with them, even after she

GB33GOMC

1 went in to talk with the government. Those conversations, I
2 gather notes of those conversations have been turned over,
3 notes regarding those conversations, so you have some sense of
4 what they are.

5 MS. TODD: Right.

6 THE COURT: And if you get into this, which you may
7 well want to, I don't know, might be helpful to the defense to
8 get into it, I don't know, she's going to kind of have to
9 explain why she didn't disclose to them that she was
10 cooperating.

11 MS. TODD: Judge, I don't think that's necessary. I
12 disagree. I think it is a way to do an end run around the
13 Court's ruling. In fact, in those communications, at least the
14 ones that I've looked at with respect to my client, they're
15 cordial. There is nothing in there to suggest fear, that my
16 client is in any way threatening her.

17 And the Court is correct, cooperators are often told
18 by the government don't let anyone know that you are
19 cooperating. She chose to communicate with both of them. I'm
20 not understanding why she now gets to augment whatever is in,
21 whether it be Facebook messages or text messages that does not
22 express any fear at all, to say, well, I was afraid, which is
23 why I was communicating with them. I think that's improper.

24 And your Honor, just as an addition, she maintained a
25 relationship with Jorge Gomez. There are numerous phone

GB33GOMC

1 conversations. They, according to some of the 3500 material,
2 they sent money to each other. It is a relationship.

3 So, I think it's not entirely -- there's a reliability
4 issue as to the truth of that concern that she was in fear.
5 She's done everything to suggest otherwise.

6 MS. CROWLEY: I think that last statement sort of
7 illustrates the point of why we think this is appropriate for
8 her to testify. Which is that she would say that a big part of
9 the reason why she continued to communicate with both
10 defendants so frequently, and in such a cordial manner, was
11 because she wanted to make it seem like there was nothing going
12 on here. And she felt that way from -- this is not something
13 she just made up to augment her testimony now, but she felt
14 that way from the time of her arrest.

15 So, I don't know that we would be comfortable with
16 just eliciting from her that, as with any cooperator, she
17 didn't want her co-defendants to know she was cooperating.
18 Because I don't think that tells the whole story.

19 MS. TODD: Or, Judge, the alternative response to that
20 would be that she is trying to gather information to assist in
21 providing information to the government. She seemed to be
22 asking a lot of questions of my client in those communications.
23 I think we're just going wayward by allowing the government to
24 say that is the reason. Because from reading the transcripts
25 of those communications, it suggests otherwise in my opinion.

GB33GOMC

1 THE COURT: That may well be true, and that may well
2 be an area for fruitful cross-examination, but if you are going
3 to cross-examine on that point, she's not going to be barred
4 from explaining her conduct.

5 In other words, if you start asking her about, well,
6 you're all friendly with Jorge and Sandy Gomez, and you're
7 continuing your relationship with them and all of that, even
8 though you're meeting with the government and blaming them for
9 this cocaine transaction. And you suggest to the jury that
10 she's being dishonest or two-faced or whatever, I can't
11 preclude her from explaining why she was being two-faced and
12 dishonest with Jorge and Sandy Gomez.

13 And if the explanation, if part of the explanation as
14 to why she was being two-faced and dishonest with them was that
15 she was afraid to tell them that she was a cooperator, how
16 could I preclude her from saying that?

17 MS. TODD: Your Honor, what we're doing right now I
18 think it's -- I don't know how the evidence is going to come
19 out. And I can't make these types of decisions. The
20 government has spoken with her, they know what they're going to
21 ask her. They should not be allowed to ask her those
22 questions.

23 THE COURT: Which questions?

24 MS. TODD: With respect to why did she continue to
25 communicate with Sandy Gomez after she was told not to. I

GB33GOMC

1 don't know --

2 THE COURT: You don't think they should be allowed to
3 elicit the explanation for that, even when you are going to
4 raise it on cross?

5 MS. TODD: They can also get to rebut that testimony,
6 but I don't know every question that I'm going to ask until I
7 hear her testimony.

8 THE COURT: I understand that, but it's not fair to
9 the government to say, well, you can't get into the area of why
10 she was not telling Jorge and Sandy Gomez that she was
11 cooperating, and allow that to come out for the first time on
12 cross-examination, because then it looks like the government
13 was trying to mislead the jury about this woman, and they don't
14 want to be in that position for obvious reasons.

15 So, I understand your point, you don't know exactly
16 what questions you're going to ask, and you don't know exactly
17 how her direct's coming in. I totally understand that, and I
18 take the point.

19 But I also take the point that the government can't be
20 in a position where it could be seen to have misled the jury
21 about what Ms. Baez was doing during this period where she was
22 meeting with them, but also continuing her relationship with
23 Sandy and Jorge. And it seems likely, based on what you've
24 said, that the topic of what she was saying to them while she
25 was cooperating with the government, that that's likely to come

GB33GOMC

1 up. It's likely to come up on cross. And if it is likely to
2 come up on cross, it would be rational for the government to
3 want to address that subject with her on direct.

4 MS. TODD: But, your Honor, why isn't it sufficient,
5 as the Court suggested, for the government to simply ask the
6 question that you were instructed not to communicate with
7 either Sandy Gomez or Jorge Gomez during the pendency of this
8 prosecution, and you continued to do so. And leave it at that.
9 Unless I then decide to challenge her on why. But why is it
10 then that they have to explain to the jury then -- Judge, maybe
11 I'm not clear. I understand what the government is trying to
12 do. They don't want to mislead the jury that she wasn't -- she
13 didn't follow the Court's instructions. They can simply elicit
14 that from her, that she continued to speak to both the
15 defendants.

16 THE COURT: Well, it sort of begs the question
17 though -- so let's just accept your proposition for just a
18 second. So, under your proposal, the government would simply
19 bring out that the prosecutors told her not to continue talking
20 with Jorge and Sandy, but she did it anyway.

21 MS. TODD: Well, the government is trying to, I think,
22 I think do an end run around the Court's ruling about the
23 threats.

24 THE COURT: No, I don't think so. Because I'm not
25 going to change -- well, for purposes of the government's

GB33GOMC

1 direct case, I'm not going to be changing my mind about the
2 admissibility of snitches get their tongues cut out. And I
3 don't think the government is urging me to go back on that
4 decision for purposes of their direct case.

5 But what they are saying is this woman continued to
6 have interactions, communications with the defendants, even
7 though she was told not to, and the jury's going to wonder why
8 she continued to have those conversations.

9 And what seems obvious to me is that she didn't want
10 them to find out she was cooperating. And that's why I asked
11 Ms. Crowley, you know, wouldn't that be good enough, because it
12 seems obvious to me the reason why she was continuing to
13 communicate with them, it seems obvious to me. I don't know
14 what happened. But, one rational interpretation of why she was
15 continuing to speak with them is she didn't want them to find
16 out she was cooperating.

17 If you were to pursue that on cross-examination, why
18 it was that she didn't want them to cooperate, then you should
19 expect she's going to say I was afraid of them.

20 MS. TODD: But I don't think that's what the
21 government said, though, your Honor. They wanted to get into
22 why she was communicating with them, and I get the sense that
23 they weren't satisfied with "I didn't want them to find out
24 that I was cooperating." That's my understanding.

25 Am I mistaken?

GB33GOMC

1 THE COURT: Well, I think if Ms. Crowley had her
2 druthers, she would want to get into I am afraid. But there is
3 that Rolling Stones song that you don't always get what you
4 want, you know. And I'm proposing the compromise position.
5 That's all I'm doing. I'm proposing a compromise. And my
6 proposal would be that when asked why did you continue talking
7 with them, even after we told you not to, even though we told
8 you not to, she would say something like "I continued talking
9 with them because I didn't want them to find out that I was
10 cooperating with the government." And that, to me, is
11 completely plausible and doesn't raise any issues about her
12 credibility.

13 And then if Ms. Todd chose to pursue that, it would be
14 in my view appropriate where further explanation is sought as
15 to the whys, that she would be permitted to explain why, which
16 is that she was afraid of them. She was afraid of them and
17 that's why she was acting the way she was acting.

18 So that really puts the ball in defense counsel's
19 court as to whether they want to go down the road of she was
20 afraid, because that's where it's headed. That's where it's
21 headed. And if you choose to pursue that, if you seek an
22 explanation from her, I'm not going to bar her from giving one.

23 So what do you say, Ms. Crowley?

24 MS. CROWLEY: I'll take it, Judge.

25 THE COURT: So, that's my ruling. No, I think that's

GB33GOMC

1 the fair thing to do. The government is permitted to elicit
2 what I consider to be a completely plausible explanation from
3 the witness and with no further explanation. But if defense
4 counsel wants an explanation, she'll get one. And it's going
5 to open -- it's going to open that issue of her being afraid.
6 I'm not saying we're going to come back to you're going to get
7 your tongue cut out, but the concept of being afraid, that's
8 going to come out. She's going to be able to answer that
9 question why didn't you want them to -- you say that you didn't
10 want them to find out you were cooperating. Why? Well, she's
11 going to be able to say why.

12 So that's the strategic call. And you have the
13 communications, and you can make whatever arguments you want.
14 You can argue you're saying you are afraid, but that doesn't
15 make any sense if you look at these communications or whatever.
16 But, she can still say that, yeah, I was communicating because
17 I was afraid.

18 So, other issues?

19 MR. COOPER: Not from the government. Thank you, your
20 Honor.

21 MS. TODD: Not from the defense, your Honor.

22 THE COURT: So we'll resume at 9:30 on Monday morning.
23 If anything does come up over the weekend, you want to talk
24 about even earlier than 9:30 let me know. There will be a
25 little bit of a delay getting the panel up here because they

GB33GOMC

1 show the panel a video and that takes a little time. So I
2 would anticipate a panel somewhere between 10 and 10:15.

3 So if there is anything of substance that needs to
4 happen before then, we can even meet earlier than 9:30. Just
5 let me know. Okay? Thank you.

6 o0o